LIKE GRADE AND QUALITY: EMERGENCE OF THE COMMERCIAL STANDARD

Although it has long been argued that the Robinson-Patman Act[1] is at least wretchedly drafted[2] if not ill-conceived and at philosophical odds with the antitrust law from which it purportedly stems,[3] this much is clear: an attempt was made to confine the operation of section 2(a) to transactions involving unfair or unwarranted price differences.[4] The express inclusion of the phrase "like grade and quality" within section 2(a) was a manifestation of that effort.[5] Survivors of the original section 2 of the Clayton

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[1] Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958): "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ."

Although the phrase, "like grade and quality," is not included in the language of 2(d) or 2(e) of the act, it has been added by interpretation to 2(d), Atlanta Trading Corp. v. FTC, 258 F.2d 365, 369 (2d Cir. 1958); Golf Ball Mfrs.' Assoc., 26 F.T.C. 824, 846-47, 851 (1938), and the addition seems likely for 2(e). See Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 128-29 (2d ed. 1959), asserting that "the words 'such products or commodities' at the end of Section 2(d) have been construed as . . . referring to goods of like grade and quality, and the same limitation will no doubt be read into Section 2(e)."

[2] Ruberoid Co. v. FTC, 189 F.2d 893, 894-95 (2d Cir. 1951); Att'y Gen. Nat'l Comm. Antitrust Rep. 130 (1955); Austin, *op. cit. supra* note 1, at 5; Howard, Legal Aspects of Marketing 152 (1964). Congress was aware of the probable confusion at the outset. Representative Celler commented on the conference report: "[T]he bill . . . contains many inconsistencies, and the courts will have the devil's own job to unravel the tangle. . . . [W]e have what might be termed . . . a 'hodge-podge.' . . . You have the herculean task to make it yield sense." 80 Cong. Rec. 9419 (1936).

[3] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936): "The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination. . . "; Rowe, Price Discrimination under the Robinson-Patman Act 11-23 (1962); Adelman, "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289, 1334-35 (1948); Rowe, "Expectation Versus Accomplishment Under the Robinson-Patman Act, 1936-1960: A Statement of the Issues," in 17 A.B.A. Section of Antitrust L. Proceedings 298, 301 (1960). See Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951).

[4] See Rowe, "Expectation Versus Accomplishment," *supra* note 3, at 301: "The Act retreated from the Patman bill by prohibiting only price discrimination having injurious competitive effects, and expressly recognized the seller's right to vary his prices to meet a competitor's lower price in good faith . . . ."; Howard, *op. cit. supra* note 2, at 50; Edwards, The Price Discrimination Law 29-30 (1959).

[5] Although the concepts of grade and quality were artifacts of the original § 2 of the Clayton Act, they received new attention in the amendment process. See notes 119-22 *infra*.

Act,[6] wherein they constituted a defense, the concepts of grade and quality were elevated by the 1936 amendment to a jurisdictional element of the new section 2(a).[7] "The primary function of the 'like grade and quality criterion,'" then, "is reasonably to confine the price discrimination statute to comparable private business transactions."[8]

The FTC and the Courts

The Federal Trade Commission's treatment of "like grade and quality" has been the principal source of its interpretation, and there has been a seeming dichotomy in Commission decisions. One line of cases deals with alleged discrimination in price between commodities bearing some degree of physical differentiation. Only this complex of cases has produced decisions holding that the commodities were of dissimilar grade or quality, and the rationale of those decisions has been elusive: some seem to rely on nothing more impressive than the fact of minute physical difference; others disregard significant distinctions; still others have ostensibly relied on style or design factors.

The second line of cases consists of those involving alleged discrimination in price between commodities differing in brand alone. The Commission's position here has been monolithic: brand differentiation alone has not been seen to create a difference in grade or quality.

The dichotomy, however, is not a bifurcation of inconsistent approaches to the "like grade and quality" issue. The Commission has uniformly used what may be deemed a "laboratory approach" in its resolution. Whether or not goods are of like grade and quality has depended, in the FTC's view, on the results of a physical comparison test. The dichotomy, then, reflects nothing more than a simple rule of thumb: only those commodities bearing physical distinctions can feasibly be of dissimilar grade or quality, thus warranting further "laboratory analysis." Commodities different

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[6] Clayton Act, ch. 323 § 2, 38 Stat. 730 (1914): "*Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold. . . ."

[7] *Supra* note 1. Rowe, "Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act," 66 Yale L.J. 1, 36 (1956) ("the jugular concept of 'like grade and quality'").

[8] Att'y Gen. Nat'l Comm. Antitrust Rep. 157 (1955). See Cassady & Grether, "The Proper Interpretation of 'Like Grade and Quality' Within the Meaning of Section 2(a) of the Robinson-Patman Act," 30 So. Cal. L. Rev. 241-42 (1957) [hereinafter cited as "Like Grade and Quality"], for the statement that "by this provision the legislators attempted to avoid interference with the pricing of unlike commodities, which might well have been . . . unconstitutional."

in brand alone are deemed a priori to be of like grade and quality; if it be known that the goods are otherwise identical, no further analysis under the Commission's "laboratory approach" is necessary to decide that they are of like grade and quality.

Case analysis will reveal that the legacy of this "laboratory approach" is uncertainty in the law of price discrimination and unnecessary price rigidity. The test has not only been inefficacious in producing criteria useful in legal planning; it has excluded from consideration the evidence of the economic value of the commodities involved. If brand differentiation creates substantially different economic value the "laboratory approach" will not perceive it. Yet if the Robinson-Patman Act was indeed intended to interdict only unfair or unwarranted price differences, the economic value of differently-priced commodities is a crucial consideration. The assertion of the Attorney General's Committee that the function of the "like grade and quality" criterion is to confine the operation of the Act to comparable *business* transactions provides a key: business transactions involve economic fact, not merely chemical fact. If the Robinson-Patman Amendment is to function as an anti-trust law, excluding unfair competition from the distribution system of the economy, the effect on competition of price differences must be brought into focus—and competition is viewed only in the market place,[9] not in the laboratory. Bearing in mind the hypothesis that the "like grade and quality" standard should include economic as well as physical comparison of commodities, a review of the cases shows that the phrase has the capacity for this more perceptive evaluation, and suggests that it may in part have played this role unapprehended.

Physically Distinct Commodities

In cases where goods have been found to be of dissimilar grade or quality, the distinguishing factors were the physical variations of the product in question.[10] Unfortunately, the Commission's peregrinations within the area of physically different products leaves the analyst awash in uncertainty. In some early informal proceedings, the Commission "recognized minor product variations

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[9] Beckman, "The Evolution of Marketing and Marketing Concepts," in Proceedings, Conference of Marketing Teachers From Far Western States 1, 3 (1958): "The chief purpose in mentioning . . . [antitrust legislation] . . . is to point out that all of this is aimed largely at the regulation or control of business activity *in the market place*. . . ."

[10] Cassady & Grether, "Like Grade and Quality," *supra* note 8, at 277: "There is no question about the position of the Federal Trade Commission re the 'like grade and quality' clause thus far—that the standard of similarity accepted by the Commission is physical identity of the product." See *id.* at 244.

to negative the statutory requirement of like grade and quality."[11] From this beginning the phrase has suffered what would seem to be some irreconcilable interpretations, each decision purporting to rest on a physical comparison test.

A district court decision of 1949, *Bruce's Juices, Inc. v. American Can Co.*,[12] serves as a reference point for evaluating ensuing Commission decisions which appeared to ignore it. The court held that two containers marketed by American, having appreciable, though not substantial, physical differences were of like grade and quality within the meaning of the act. The complainant, Bruce's Juices, Inc., alleged competitive injury stemming from the higher price it was charged for one size of can; American had refused to sell it a different but equally serviceable can which American was furnishing to Bruce's competitor at a lower price. In explanation of the decision on the grade and quality issue, the court stated that "the cans were all of commercial grade and quality and gave substantially identical performance." [13]

The Commission was not quick to explore the possible implications of the *Bruce's Juices* decision, which held by implication that important physical differences in a manufacturer's products would not automatically exempt them from the proscription of price discrimination.[14] In the *Champion Spark Plug Co.* case of 1953,[15] insubstantial physical differences were the basis of the Commission's decision that certain goods were not of like grade and quality. Champion had sold a special brand of plug to Montgomery Ward & Co., at a price lower than its Champion-branded number. The difference between the two items involved only minor variations, of unknown functional significance, in the insulator and "ribs." [16]

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[11] 81 Cong. Rec. App. 2336-39 (1937). In a case involving ladies' handbags, the Commission held that "the merchandise in question was not, in fact, of the same grade and quality. . . . It appeared to contain bags of various grades and qualities, *particularly with respect to market values.*" *Id.* at 2337. (Emphasis added.) In another case, the commission felt that various handbags were not of like grade and quality because some bore "the chain store's private brand or trade-mark and are specially designed to match the shoes which it sells." *Id.* at 2339. Similarly, certain ladies' hats were held to be of dissimilar grade and quality, one of the factors considered being that some of the hats were "slow-moving styles." *Ibid.* See Rowe, *op. cit. supra* note 7, at 9-10.

[12] Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *modified*, 190 F.2d 73 (5th Cir. 1951), *cert. dismissed*, 342 U.S. 875 (1951). Compare Package Closure Corp. v. Sealright Co., 141 F.2d 972, 979-80 (2d Cir. 1944).

[13] 87 F. Supp. at 987. *Cf.* McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456, 460-61 (W.D. Mo. 1948).

[14] Compare Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768 (8th Cir. 1934).

[15] 50 F.T.C. 30 (1953).

[16] Rowe, Price Discrimination Under the Robinson-Patman Act 67 & n.97 (1962).

As in the informal handbag and millinery manufacturers' decisions of 1937,[17] all that is evident is that the fact of physical difference, noticeable in a laboratory, created dissimilarity in the grade or quality of these commodities.

The Commission began a perceptible drift from this attitude in the 1955 decision in *E. Edelmann & Co.*[18] The respondent, a supplier of automobile replacement products, was charged with selling its goods to small businessmen at less favorable prices than to their large competitors. In rejecting respondent's protest that certain of the goods sold to the larger accounts were not of a grade or quality like those sold at higher prices, the hearing examiner held that "the only differences were the brand name or mark, stamped or lithographed, on the product, and the printed insert in the hydrometer. . . . The floats are interchangeable, and apparently there is no basic functional difference. The finding is that these products were of substantially like grade and quality."[19] Unlike the goods in the handbag and millinery manufacturers' cases or the *Champion Spark Plug* case, the FTC saw these minimal physical distinctions as too minute to effect a difference in the grade or quality of these automotive parts. Again the Commission's explanation was couched in terms of physical differences, the significance of which were not apparent.

If the *Edelmann* case revealed only a drift, the 1956 decision in *General Foods Corp.*[20] showed the Commission on a wholly new heading. Respondent had been selling its institution pack Maxwell House brand coffee to Institution Contract Wagon Distributors at a lower price than it sold its grocery pack Maxwell House brand to other wholesalers. It was held that what was apparently a significant physical variation in the blend[21] did not render the

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17 *Supra* note 11.

18 51 F.T.C. 978 (1955).

19 51 F.T.C. at 983. This aspect of the case was later dismissed on the grounds of lack of competitive injury. *Id.* at 985.

20 52 F.T.C. 798 (1956)

21 *Id.* at 800:

> Institution coffee is blended to retain flavor and meet the aroma requirements of institution trade, and often is processed by respondent to meet the taste of a specific institution or chef. Ordinarily respondent's Maxwell House institution coffee is a blend of six different kinds of coffee beans, while the grocery-pack formula calls for five kinds; the additional kind of bean in the institution pack is to provide "staying" qualities in the coffee to insure longer periods of freshness. There is some variance also in the roasting processes, resulting in some difference between the two types of coffee in color and taste. Maxwell House grocery-pack coffee is not always of identical blend, and, of course, varies in grind.

Compare Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312, 319 (N.D. Ill. 1960).

coffees of dissimilar grade or quality.[22]

Offering conclusions as rationale, the hearing examiner suggested that differences in various coffee grinds, variances in roastings of the same blends, and seasonal or other crop variations had no relation to grade and quality; therefore, neither would the blend variation here under analysis.[23] Significantly, however, a rationale similar to that of *Bruce's Juices* was beginning to hold sway: the *General Foods* opinion noted the fact that the differing blends "can be and are sold for the same use, sometimes competitively."[24] The evidence of lack of market response to the blend variations revealed their competitive equality. Although it seems likely that the examiner was not impressed with the significance of this facet of the evidence, this was a situation in which the commercial standard supported and made cogent the FTC's position that physically distinguishable goods were of like grade and quality.

Apparently mesmerized by the facility with which the *Bruce's Juices* approach had swept the physically distinct products in *General Foods* into its jurisdiction, the Commission delivered the truly aberrational decision in *Atalanta Trading Corp.*[25] The respondent urged that it was not guilty of a section 2(d) violation for granting promotional allowances on specially packaged ham and on specially processed and packaged Canadian bacon. These specialty items had each been sold only to a single purchaser; competitors who had purchased other pork products from Atalanta were not entitled to promotional allowances, it was argued, because they had not purchased goods of grade or quality like the promoted items.[26] Blinking the fact that in *General Foods,* as in *Bruce's Juices,* the actual ratio decidendi drew on the evidence that *consumers* regarded the physically different goods as being of like grade and quality,[27] the hearing examiner resolved the question through hypothesization. Focusing on the common source of bacon, hams, and pork shoulder picnics, the initial decision announced with astonishing temerity that "all of these products were pork,

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[22] 52 F.T.C. at 817.

[23] *Id.* at 816-17.

[24] *Id.* at 817. See *id.* at 816 for testimony revealing that the coffees had sold competitively. *Bruce's Juices* was not cited, but the rationale of that case was used as a ground of decision. 52 F.T.C. at 817.

[25] 53 F.T.C. 565 (1956).

[26] 53 F.T.C. at 568.

[27] Certainly this was so in *Bruce's Juices,* and it was also the case in *General Foods,* despite the Commission's attempt to advance the "brand identity" presumption. 52 F.T.C. 798, 817 (1956). The actual ground of decision was an admixture of what the Commission viewed as insignificant physical distinctions and evidence of consumer behavior; the "presumption" arguably appears as gratuitous dictum. *Ibid.*

and *to the hearing examiner,* ham is ham. . . ."[28]

The exceptionable aspect of what has been characterized as the "laboratory approach" is here apparent. The distinct commercial identities of these various pork products in the view of the consumer in the market place would seem so obvious as to warrant judicial notice.[29] Yet by limiting his inquiry to physical comparison in a commercially sterile "laboratory," the examiner remained unaware of the existence and competive significance of this fact.

In *Bruce's Juices* and *General Foods,* where goods having appreciable physical differences were found to be of like grade and quality, the decisions were tethered to evidence that consumers regarded the commodities involved as being of equal value. This is a fact infinitely more valuable to one attempting to evaluate the effect on competition of a price difference between these products than a laboratory analysis of comparative composition. In *Atalanta,* however, the examiner cast off these lines and pirated the ship. Coveting the results of cases[30] which had gathered physically distinct goods within the boundaries of "like grade and quality," he held that various pork products were of the required jurisdictional similarity because, without reference to the market, ham was ham.[31]

The Commission's decision was reversed by the court of appeals.[32] While describing the function of section 2(d), the court pinpointed the goal of the Robinson-Patman Amendment: "[T]he customer's . . . sole concern is to be given an *equal opportunity with his competitors.* . . ." [33] If the act seeks to guarantee this opportunity by screening out unfair price differences, product distinctions having an effect on selling price must be considered. The court further stated:

> the test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded.[34]

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[28] Atalanta Trading Corp., *supra* note 25, at 568. (Emphasis added.) The Commission subsequently affirmed the initial decision in similar language. *Id.* at 571-72.

[29] See Atalanta Trading Corp. v. FTC, 258 F.2d 365, 371 n.5.

[30] Again, *Bruce's Juices* was not cited; while *General Foods* was cited, it was doubtlessly for the "brand identity" dictum. See note 27 *supra.*

[31] 53 F.T.C. at 568.

[32] Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958), *reversing* 53 F.T.C. 565 (1956).

[33] *Id.* at 370. (Emphasis added.)

[34] *Id.* at 371. The court's footnote 5 reveals that *price* distinctions were among those not to be disregarded.

The Second Circuit's emphatic rebuke in *Atalanta* was apparently not lost on the Commission. Recent decisions reveal a comprehending implementation of the physical comparison test of like grade and quality as modified by that court.[35] In *Universal-Rundle Corp.*[36] a manufacturer of plumbing fixtures was charged with price discrimination for charging a lower price for the Homart brand line it manufactured for Sears, Roebuck & Co. than that charged to Sears' competitors for its own U-R brand line. The hearing examiner found that there were significant differences in the sizes of the fixtures in the two lines, and in the design and amount of enameled surface.[37] Witnesses testified that these differences enhanced marketability, and that it was accepted practice in the industry to vary price in accordance with such differences as existed between the U-R and Homart lines.[38] Upholding the examiner's finding that these goods were not of like grade and quality, the Commission rejected the complainant's contention that "physical differences in products which affect consumer preference or marketability can . . . be disregarded."[39]

This decision was reaffirmed the following November in *Quaker Oats Co.*[40] Respondent was selling a special blend of oat flour, run 14, to the Gerber Products Co. at a price lower than it sold other oat flour to Gerber's competitiors. The hearing examiner had held that the run 14 blend was of a grade and quality like respondent's other blends, since Quaker "had not shown that the cost of manufacturing run 14 was different from the cost of manufacturing . . . other oat flour blends and that there are no objective standards for oat flour set up by government or business."[41] The record revealed, however, that "run 14 had a substantially higher hull content than other oat flour blends . . . and was generally unacceptable except to Gerber."[42] Quoting *Universal-Rundle,* the Commission reversed the examiner, holding that "if there are substantial

[35] However, *Atalanta,* escalating a dictum of *General Foods,* (see note 58 *infra*) rested in part on the Commission-created presumption of "like grade and quality" accompanying products sharing brand identity. It is arguable that *Atalanta* is best viewed as rejecting the ludicrous cross-elasticity seen by the Federal Trade Commission and the "brand identity presumption." See 258 F.2d at 370-71; Comment, 29 U. Chi. L. Rev. 160, 170 (1961). But it seems more likely that the *Atalanta* court also meant to require a consideration of market performance. See 258 F.2d at 371 & n.5.

[36] 3 Trade Reg. Rep. ¶ 16948 (FTC June 12, 1964).

[37] *Id.* at 22004.

[38] *Ibid.*

[39] *Id.* at 22005.

[40] 3 Trade Reg. Rep. ¶ 17134 (FTC Nov. 18, 1964).

[41] *Id.* at 22215.

[42] *Ibid.*

'physical differences in products which affect consumer preference or marketability,' . . . such products are not of like grade and quality . . . regardless of whether manufacturing costs are the same. . . ."[43] Clearly, a new factor has been included in the FTC's announced formula for evaluating grade and quality. While adhering to the notion that only physically different goods can be of dissimilar grade or quality, the Commission now agrees that at least in those cases, the effect *in the market* of a physical variation will provide the key to the issue of grade or quality.[44]

The Tribulations of Brands

The Federal Trade Commission has consistently maintained its dichotomy between physical and brand variations: brand differentiation of physically identical goods has not been seen to create goods of dissimilar grade or quality.[45] The genesis of this doctrine appeared in the 1936 decision of *Goodyear Tire & Rubber Co.*[46] Goodyear had sold first-line tires to Sears, Roebuck bearing the Sear's Allstate label, at a price lower than that charged to Goodyear distributors for first-line tires bearing Goodyear's own Allweather brand. Following a physical comparison test, the Commission found the differently-branded tires to be of like grade and quality.[47] It discounted dealer testimony revealing the competitive

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[43] *Ibid.* Note that the Commission added the requirement of *substantial* physical difference. It does not seem likely, however, that this will be allowed to become the tail that wags the dog. If substantial consumer preference for one product having insubstantial physical distinctions can be demonstrated, the Commission will almost certainly yield on the grade or quality issue.

[44] For a post-*Atalanta* court decision see Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312 (N.D. Ill. 1960). It seems arguable that under this new test, the change of labels on a package is a physical distinction which, if responsible for demonstrable consumer preference, ought to render the goods of dissimilar grade or quality. Cassady & Grether, "Like Grade and Quality," *supra* note 8, at 264.

[45] *E.g.*, Fred Meyer, Inc., CCH Trade Reg. Rep. Transfer Binder, FTC Complaints and Orders 1961-63 ¶ 16368, at 21217 (FTC March 29, 1963); Baum, The Robinson-Patman Act 13-14 (1964).

[46] 22 F.T.C. 232 (1936).

[47] The respondent did not challenge on this issue, conceding that the tires sold to Sears, Roebuck were "considered of comparable quality." 22 F.T.C. at 290. Counsel apparently had little appreciation of the differentiating potential of the "like grade and quality" standard, a notion further illustrated by the fact that the tires were physically distinct in tread design. 22 F.T.C. at 255. Goodyear distributors testified that Goodyear's "All Weather Non-skid Tread" brand was a physical characteristic which was valued above the Sears tread features. 22 F.T.C. at 311. Consumer preferences for a physical characteristic as well as for a brand name were disregarded by the Commission, which clearly followed the notion that the two lines of tires were comparable in a laboratory analysis of performance, and were therefore

handicap of the Allstate tire as against the established nationally-advertised Goodyear brand name;[48] the Commission preferred a laboratory test of grade and quality to a market test.

There followed in 1938 a similar decision in the case of *Hansen Inoculator Co.*[49] In that crucial case the respondent manufactured a commercial legume inoculant which it sold under the Hansen label to some purchasers at a higher price than that charged for the same inoculant sold under private label to favored purchasers. The Commission found the Hansen-branded product to be of a grade and quality like the private brand.[50] The Commission did not concern itself with whether or not there were commercially significant distinctions between the two brands. The view in both *Goodyear* and *Hansen* was that goods which were physically comparable and would yield like results in a laboratory analysis of composition or performance were of like grade and quality within the meaning of the act. Consequently, the effects of brand differentiation were considered irrelevant.[51]

The Commission's position that brand variations could not negate the similarity of grade and quality of physically comparable goods was affirmed in the decision in *United States Rubber Co.*[52] U.S. Rubber had sold tires to Montgomery Ward and Western Auto, among others, at lower prices than those charged to smaller customers for comparable tires bearing the nationally advertised U.S. Royal brand.[53] Without benefit of evidence bearing on the commercial significance of the different brands, the Commission concluded:

> Said respondent has . . . sold . . . special brand tires . . . at prices different and lower than the prices charged and allowed by it to other purchasers of its tires of like grade and quality bearing its own brands. By so doing respondent has discriminated in price. . . .[54]

This same respondent was again found guilty of price discrimination in the 1950 *United States Rubber Co.* decision.[55] Respon-

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of like grade and quality within the meaning of the act. *Cf.* Universal-Rundle Corp., *supra* note 36; Quaker Oats Co., *supra* note 40. Compare this notion of comparable utility with the handbag and millinery decisions discussed in note 11 *supra*.

48 22 F.T.C. at 311. National advertising expenditures amounted to $4,500,000 per year and $72 million during Goodyear's life as a tire manufacturer.

49 26 F.T.C. 303 (1938).

50 *Id.* at 308.

51 See commentary on anonymity of the source in text to notes 143-45 *infra*.

52 28 F.T.C. 1489 (1939).

53 *Id.* at 1500.

54 28 F.T.C. at 1500.

55 46 F.T.C. 998 (1950).

dent had sold its brand name canvas footwear, Keds, at a price higher than that charged for comparable private brand shoes.[56] Again without benefit of evidence of the commercial significance of the brand distinction, the Commission found the differently-branded shoes to be of like grade and quality because they were physically similar.[57]

The 1956 decisions in *Atalanta* and *General Foods* involved "branding" issues in addition to those considered earlier. To the backlog of decisions clearly showing that, in the Commission's view, brand differentiation of identical goods could not result in a variation in grade or quality, the Commission introduced a new criterion of "like grade and quality" in *General Foods*:

> The respondent has labeled the institution-pack and the grocery-pack coffee here involved as Maxwell House coffee, [58] lending, at least, the presumption that the two packs are of like grade and quality.[59]

This was, of course, nothing less than a staggering reversal of form. Brand identity could in one situation create a presumption of like grade and quality, while in another, brand differences could have no role whatsoever as an indicium.[60]

As if the fallacy of this presumption were not immediately patent, the notion was extended to the extreme ten months later in the *Atalanta* affair.[61] Citing *General Foods*,[62] the hearing examiner concluded that the canned hams, pork shoulder picnics, and Canadian bacon "were sold under respondent's brand name of 'Unox' and all were of 'like grade and quality.' "[63] The Commission

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[56] 46 F.T.C. at 1007.

[57] 46 F.T.C. at 1008. Apparently the Commission relied on the respondent's practice of referring to both the nationally advertised and the unadvertised shoes as "first grade and quality waterproof rubber footwear" in its discount schedules. *Id.* at 1008-09. This emphasizes the Commission's insistence on the "laboratory test" of grade and quality and its rejection of the market test. *Cf.* Fred Meyer, Inc., *supra* note 45, at 21217. "a supplier's use of identical descriptive data on invoices to favored and non-favored customers . . . establishes, *prima facie,* the fact of like grade and quality."

[58] That the goods were physically distinct is beyond question. See note 21 *supra.* The Commission had concluded that the grocery-pack and institution-pack coffees were of like grade and quality because the coffees sold competitively. General Foods Corp., 52 F.T.C. 798, 817, (1956). [author's footnote.]

[59] General Foods Corp., *supra* note 20, at 817.

[60] Rowe, *op cit. supra* note 16, at 70-71.

[61] Atalanta Trading Corp., 53 F.T.C. 565 (1956).

[62] See note 58 *supra.*

[63] 53 F.T.C. at 568.

affirmed the decision in similar language.[64] The doctrine was distinctly unpalatable and was overruled in the appeal to the Second Circuit.[65] The court of appeals' decision at least resolved the inconsistency of the brand identity presumption, but it is uncertain what, if any, effect that court meant to lend to the Federal Trade Commission's rejection of brand distinction of otherwise identical goods as a criterion of like grade and quality.[66]

That the latter rule survived *Atalanta* intact in the Commission's view is certain.[67] In *American Metal Products Co.*[68] the respondent had been selling bathtubs to Crane bearing the latter company's Crestmont brand at a lower price than that charged to other purchasers of similar bathtubs carrying American Metal's own brand. The initial decision held that since the Crestmont tubs "were similar and comparable to like models under the [respondent's] brand name of AllianceWare, differing only in the design of apron affixed to them,"[69] the two lines of fixtures were of like grade and quality. The Commission was not willing to recognize the relevance of the commercial significance of a distinction in a case where the difference was in brand alone. Perhaps it was thought that the Second Circuit's *Atalanta* rationale could be confined to cases involving physical differences resulting in commercially distinct products.

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[64] 53 F.T.C. at 571.

[65] Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958), *reversing* 53 F.T.C. 565 (1956). See note 35 *supra*.

[66] See Rowe, *op. cit. supra* note 16, at 71-72, 74, for the view that *Atalanta* presaged a test of grade and quality employing criteria other than physical factors. Mr. Rowe notes the court's opinion that only artificial distinctions, not all distinctions, are to be disregarded in deciding the issue. He suggests that this applies to substantial brand variation of identical goods. This conclusion may well be warranted by the *Atalanta* court's footnote recognizing the relevance of cross-elasticity, noting that the various pork products were not competitive "price-wise." Atalanta Trading Corp. v. FTC, *supra* note 65, at 371 n.5. See *supra* note 35. However, it is arguable that the court was referring only to physical distinctions which are either artificial or substantial, the latter having an effect on consumer preference. See Universal-Rundle Corp., *supra* note 36; Quaker Oats Co., *supra* note 40.

[67] See Hartley & Parker, Inc. v. Florida Beverage Co., 307 F.2d 916 (5th Cir. 1962), a post-*Atalanta* decision, and Page Dairy Co., 50 F.T.C. 395 (1953). *Cf.* a few of the post-*Atalanta* Trade Practice Conference Rules: Optical Products Industry, 4 Trade Reg. Rep. ¶ 41192, at 43276-77 (June 30, 1962); Hosiery Industry, 4 Trade Reg. Rep. ¶ 41152, at 43071 (Aug. 30, 1960, as amended June 1, 1964). *But cf.* Mirror Industry, 4 Trade Reg. Rep. ¶ 41118, at 42929-35 (June 30, 1962, as amended May 16, 1963); Woodworking Machinery Industry, 4 Trade Reg. Rep. ¶ 41092 (June 24, 1960).

[68] 60 F.T.C. 1667 (1962).

[69] *Id.* at 1679-80. The initial decision was subsequently vacated for mootness. *Id.* at 1689.

In the same year the Commission also handed down its decision in *Borden Co.*,[70] a case involving an ideal fact pattern for a test of the FTC's resolve. The Commission did not flinch.

The Borden Case

The Borden Co. was charged with a section 2(a) violation for selling evaporated milk under private label at a lower price than that for which it offered its own Silver Cow brand evaporated milk. The company conceded that the private label milk was chemically identical to and was packed in the same method as the Silver Cow brand milk. Borden asserted that despite the chemical identity of the two brands, they were not of like grade and quality. The foundation of this contention was that the Silver Cow brand label enjoyed an intense public demand not shared by the private label.[71] Adhering to its per se prohibition of brand differentiation, the Commission flatly rejected the argument,[72] stating, "We believe it to be more reasonable . . . to interpret the phrase so as not to exclude the application of the Act in cases where the only distinction is in the label." [73] Respondent appealed, and in this, the first case on the precise issue to reach a court of appeals,[74] the Fifth Circuit unequivocally reversed the Federal Trade Commission's doctrine:

> In determining whether products are of like grade and quality, consideration should be given to all *commercially significant*

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[70] Borden Co., CCH Trade Reg. Rep. Transfer Binder, FTC Complaints and Orders 1961-63 ¶ 16191 (Nov. 28, 1962). It is certain that the FTC's physical comparison test of grade and quality has not been much contested by the various respondents who had solid cases for doing so. See Cassady & Grether, "Like Grade and Quality," *supra* note 8, at 244 n.12. *E.g.*, Goodyear conceded the issue of grade and quality (see *supra* note 47); the U.S. Rubber Co did not challenge the Commission in its cases involving price differences on U.S. Royal tires, 28 F.T.C. 1489, 1503 (1939), and Keds, 46 F.T.C. 998, 1012-13 (1950), and the same products distributed under private brand. See Rowe, *op. cit. supra* note 16, at 69-70. In 1957 it was suggested that the Commission might not "be adamant if a case were properly presented. It might even accept the market test. . . ." Cassady & Grether, "Like Grade and Quality," *supra* at 277. *Atalanta* and *Borden*, however, showed this was not to be the case.

[71] Borden Co., CCH Trade Reg. Rep. Transfer Binder, FTC Complaints and Orders 1961-63 ¶ 16191, at 21017 (Nov. 28, 1962).

[72] *Id.* at 12018-19.

[73] *Id.* at 21018.

[74] The opinion stated: "The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination. . . . We find no case which controls our disposition of this issue." Borden Co. v. FTC, 339 F.2d 133, 136 (5th Cir. 1964).

distinctions which affect market value, whether they be physical or promotional.[75]

The court was insisting that cases must be decided on the facts of market performance[76] rather than by laboratory analysis alone.[77] Athwart the Commission's per se approach stood the Second Circuit's compelling declaration in *Atalanta* that the "like grade and quality" standard was necessary to prevent artificial distinctions from rendering the Act impotent, but that some distinctions could not be disregarded.[78] The court could ascertain from the record that the FTC's notion that, as between the Silver Cow brand and the private label, "the only distinction is in the label" would not parse with the evidence.[79] The testimony of various witnesses revealed that the Borden brand label was of commercial significance at each level of distribution:

> As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting.[80]

The court could not ignore this compelling voice from the market place. The Commission's physical analysis could establish the chemical identity of Silver Cow and brand *X*, but not the commercial virtuosity of the Borden brand. The market facts of the commercial standard revealed the significantly higher economic value of the Borden label resulting from consumer preference.

The Federal Trade Commission's monolithic refusal to yield to a commercial standard of like grade and quality has been devastated in the two appellate decisions in point. The *Atalanta* court injected the commercial standard into the test of the grade and quality of goods bearing physicial variations, and the *Borden* court

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[75] *Id.* at 137. (Emphasis added.)

[76] *Id.* at 135-36. "The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. *Customers at the retail level are willing to pay more for it than for private label because of the Borden name.*" (Emphasis added.)

[77] *Id.* at 135: "Under the construction of the Act adopted . . . by the Commission the 'like grade and quality' determination was based *solely on the physical properties of the products* without regard to the brand names they bear or the relative public acceptance enjoyed by each." (Emphasis added.)

[78] *Id.* at 138 & n.8.

[79] *Supra* note 76.

[80] 339 F.2d. at 136 n.3.

completed the task by adding that standard to the "premium brand" cases. However, while the Commission has apparently acquiesced in the Second Circuit's *Atalanta* decision in the *Universal-Rundle*[81] and *Quaker Oats*[82] cases, more resistance to the *Borden* decision may be anticipated.[83]

The Case for the Commercial Standard

The "Meeting Competition" Cases

Illustrating how flexible has been the Federal Trade Commission's perception of "like grade and quality," the section 2(b)[84] cases stand in sharp relief beside section 2(a) and 2(d) decisions.[85] Section 2 of the original Clayton Act contained an exemption for meeting competition which was subsequently narrowed in the Robinson-Patman Amendment to apply only where price differences were initiated to meet, but not beat, the equally low price of an actual competitor.[86] The rationale of this provision is that the lowering of prices to meet or to preserve competition is the very business activity the antitrust laws should foster, not forbid. But this baldly stated truism belies the complexity involved in implementing the defense. The injunction against beating competition inevitably raises the question of *what* goods are competitive at *what* price: at what level does the price of product *A* meet or beat the price of competing product *B*? A priori, the answer rests solely with the consumer, and it is this fact that first invoked FTC cognizance of the concept of the premium brand.

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[81] *Supra* note 36.

[82] *Supra* note 40.

[83] CCH Trade Reg. Reports No. 186 (Feb. 8, 1965): The Commission requested that the Solicitor General seek review in the *Borden* case and the appeal has been recently filed. However, there is persuasive authority antedating the Fifth Circuit's decision which contended for the commercial standard employed therein. *E.g.*, Att'y Gen. Nat'l Comm. Antitrust Rep. 157-58 (1955) (minority position); Rowe, Price Discrimination Under the Robinson-Patman Act (1962); Cassady & Grether, "Like Grade and Quality," 30 So. Cal. L. Rev. 241 (1957).

[84] Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958). One proviso to this section establishes a defense for a manufacturer whose "lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

[85] For some relevant, tongue-in-cheek commentary, see Mason, "Discriminate in Price Between Different Purchasers of Commodities of Like Grade, Quality and Popularity," in An Antitrust Handbook 165, 173-75 (1958).

[86] 49 Stat. 1526 § 2(b) (1936), 15 U.S.C. § 13(b) (1958). See Att'y Gen. Nat'l Comm. Antitrust Rep. 179-80. *Compare* Federal Trade Commission, "Final Report on the Chain-Store Investigation," S. Doc. No. 4, 74th Cong., 1st Sess. at 90 (1935), *with* American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930) *and* Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929). Compare Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768 (8th Cir. 1934).

In *Minneapolis-Honeywell Regulator Co.*,[87] the respondent was charged with discriminating in price between different purchasers of its automatic heating controls for heating plants. Being unable to establish a successful cost justification for the lower prices, the respondent asserted that these low prices were granted to certain large purchasers to meet the even lower prices of competing manufacturers.[88] The Commission rejected the defense: "respondent has developed a large customer demand for, and public acceptance of, its controls, and has been able consistently to sell them at prices higher than those charged by its competitors." [89] And further:

> When price differentials . . . reach a point where they cannot be justified by cost differences, it is unsound and inconsistent to urge that they then become prices which have been made in good faith to meet the equally low or lower prices of competitors simply because they may not be lower than competitors' prices. To accept this proposition would mean that any seller of a *commodity which generally sells at a premium price* may freely discriminate among its customers so long as it does not undercut the prices of competitors. Such an interpretation would make the act largely unworkable. . . .[90]

The premium product rationale of *Minneapolis-Honeywell* was made more emphatic in the *Standard Oil Co.*[91] decision of 1953. Respondent asserted that lower gasoline prices offered certain customers were granted to meet competition. The Commission noted that one of the prices Standard Oil was "meeting" was "on Fleet Wing gasoline which . . . was not a major brand of gasoline. In the trade sense, it was an off brand and generally sold at prices lower than major brands of gasoline."[92] This was crucial to the Commission's decision to reject respondent's defense, for the opinion states:

> There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade and quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline *public acceptance rather than chemical analysis of the product is the important competitive factor.*[93]

The concept was reiterated in matter-of-fact fashion in the

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87 44 F.T.C. 351 (1948).
88 44 F.T.C. at 396.
89 *Ibid.*
90 *Id.* at 396-97. (Emphasis added.)
91 49 F.T.C. 923 (1953).
92 *Id.* at 952.
93 *Ibid.* (Emphasis added.) Note that the Commission apparently viewed this issue as being divorced from the "like grade and quality" issue.

Commission's opinion in *Anheuser-Busch, Inc.* [94] Respondent had lowered its price on its premium beer in the St. Louis area with competitive success. Rejecting the proffered defense of meeting competition, the Commission offered the same objection:

> It is evident that Budweiser could and did successfully command a premium price in the St. Louis market. . . . *The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market.*[95]

Again in the 1964 decision in *Callaway Mills* [96] the Commission rejected a seller's "meeting competition" defense, declaring that:

> Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or *intense public demand,* normally commands a price higher than that usually received by sellers of competitive goods.[97]

The consistent theme of these cases has been that a mere comparison of the prices of the products of the respondent and his competitor is meaningless. Although not expressly included in section 2(b), the Commission and the courts have found it necessary to import a "like grade and quality" comparison of competing goods into that section; and the results of that comparison have been grounded on the facts of consumer preference. The Commission, it seems, would live in the best of all possible worlds. In the section 2(a) and section 2(d) cases it has insisted that mere brand differentiation of a single manufacturer's products could not effect a change in grade or quality. Yet in the section 2(b) cases, the Commission insists that the products of competing manufacturers must be compared by the same commercial standard it would otherwise reject to ascertain whether a price adjustment meets or beats competition.[98] In the section 2(b) cases, the fact

[94] 54 F.T.C. 277 (1957), *rev'd,* 265 F.2d 677 (7th Cir. 1959), *rev'd and remanded to court of appeals,* 363 U.S. 536 (1960), FTC *again rev'd,* 289 F.2d 835 (7th Cir. 1961).

[95] *Id.* at 302. (Emphasis added.) See 58 Colum. L. Rev. 567 (1958); 71 Harv. L. Rev. 1367 (1958).

[96] Trade Reg. Rep. ¶ 16800 (FTC Feb. 10, 1964).

[97] *Id.* at 21755. (Emphasis added.) The Commission has placed on the seller the burden of establishing that his price reductions do no more than meet competition, *e.g.,* Callaway Mills, *supra* at 21755; Cabin Crafts, Inc., Trade Reg. Rep. ¶ 16802, at 21774 (FTC Feb. 10, 1964).

[98] The majority of the Attorney General's Committee was guilty of the inconsistency; after approving the FTC's method of treating the issue of "like grade and quality" in the § 2(a) cases, it also approved the "premium brand doctrine" in

that competitors' products may be as physically fungible as gasolines [99] is irrelevant for meeting competition purposes;[100] the consumer's preference for a brand is the crucial factor;[101] otherwise the act would be "largely unworkable."[102]

Unquestionably the Commission is correct when it decides the issue of "like grade and quality" in the section 2(b) cases on the evidence of a market test. If it be demonstrated that a substantial number of consumers purchase Standard Oil gasoline in preference to Fleet Wing if the products are offered at the same price, regardless of chemical similarity, the two brands are not of competitive like grade and quality. The inconsistency of the Commission's position is clear, however, for the same rationale is equally applicable in the section 2(a) or section 2(d) cases. When Borden placed the same milk under a Silver Cow label and a private label, the market test revealed substantial consumer preference for the Borden brand. Yet the Commission refused to countenance in a section 2(a) situation the same test of grade and quality it had adopted in the meeting competion cases. The Fifth Circuit rebuked the FTC for its inconsistent rejection of its own precedents,[103] declaring that:

> if . . . [the consumers' preference] . . . is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case.[104]

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the "meeting competition" cases: "[T]he seller of the premium product sometimes must not go down to the price level of the lesser product." Att'y Gen. Nat'l Comm. Antitrust Rep. 184 (1955). Correctly fingering the proper issue of the "meeting competition" defense, and indeed the proper issue of the Robinson-Patman Amendment, the Committee focused on the competition in the market: "In each case, the heart of the matter is whether actual competition, not merely a nominal price quotation, is equalized. . . ." *Ibid.*

[99] See Standard Oil Co., *supra* note 91.

[100] See text at note 93 *supra.*

[101] For a court's adopting this test, see Gerber Prods. Co. v. Beech-Nut Life Savers, Inc., 160 F. Supp. 916 (S.D.N.Y. 1958). Plaintiff alleged that defendant's adjustment of its price to the same as plaintiff's constituted beating competition. Plaintiff's argument was that defendant's product enjoyed greater consumer preference because it was packed in glass while plaintiff's was packed in tin. The court declared that the "crucial issue . . . hinges on whether defendant's product is a premium product," *id.* at 921. "The ultimate test . . . is a greater price for the glass contained product." *Id.* at 922. The affidavits indicated such was not the case and plaintiff was denied relief, *id.* at 921-22.

[102] See text at note 90 *supra.*

[103] See Kalinowski, "Price Discrimination and Competitive Effects," in 17 A.B.A. Section of Antitrust L. Proceedings 360, 379-80 (1960).

[104] Borden Co. v. FTC, 339 F.2d 133, 139 (5th Cir. 1964). The § 2(b) cases do not stand alone as precedent for legal cognizance of the value of a brand name.

The Anticompetitive Effect

> In some industries heavy national advertising and sales promotion have cultivated significant consumer preferences in a brand-conscious American public. Particularly on commodities for resale . . . resale value and mobility is an aspect of "grade and quality." *For commodities containing precisely identical ingredients packaged under a distinctive mark or label may not command equal consumer acceptance.* Nationally advertised "premium" goods are "competitive" with unknown entities or "economy" brands only at a significant margin in price. . . . A price discrimination law can consider heavily advertised and anonymous or private-brand merchandise on an equal legal footing *only at a serious distortion of economic facts.*[105]

Borden and the section 2(b) cases have rested on this thesis. Regardless of physical similarity or functional interchangeability, competing goods are simply not of like grade and quality if the consumer will not pay the same price for them.[106] In fact, they are not

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Consider the substantial bodies of law dealing with: secondary meaning, see Stern & Grossman, "Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition," 110 U. Pa. L. Rev. 935 (1962); trademarks, see Schroeter, "Trademarks and Marketing," 48 Trademark Rep. 783 (1958); fair trade, see Fulda, "Resale Price Maintenance," 21 U. Chi. L. Rev. 175, 184-85 (1954).

[105] Att'y Gen. Nat'l Comm. Antitrust Rep. 158 (1955) (minority view).

[106] It is clear that consumer preference has become an element in the determination of the "relevant product market" in antitrust suits under the Sherman Act and § 7 of the Clayton Act. In United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (*The Cellophane Case*), it was found that du Pont did not have monopoly power in the relevant product market. This determination rested on the finding that du Pont's product, cellophane, constituted less than 20% of the flexible packaging material market, which included glassine, waxed paper, foil, and pliofilm. 351 U.S. at 399-400. Crucial to the Court's decision was the finding that there was not only reasonable interchangeability among these competing products, but a *responsive* interchangeability: if the purchasers of flexible wrappings would switch from one product to the other in concert with price fluctuations, "the products compete in the same market." 351 U.S. at 400. The record from the lower court sustained the finding "that the '[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes' prevented du Pont from possessing monopoly control over price." *Ibid.* Consumer behavior, then, was the key to the boundaries of the relevant product market.

Although the Court was less specific, a similar analysis seems to be the heart of United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (the *du Pont-General Motors* case). In the § 7 case, du Pont argued that it did not occupy a monopoly position in the relevant product market, basing its argument on statistics showing that it supplied General Motors with only 3.5% of finishes sold to industrial users and 1.6% of the total market for the type of fabric used in the auto industry. The Court found the relevant product market to be drastically narrower than "all industrial users" or "the automobile industry," however, basing its determination on the fact that the record showed "that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from

all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act." 353 U.S. at 593-94. The reasonable translation of this would seem to be that the Court saw no significant *responsive interchangeability* among the du Pont finishes and fabrics and those used by all industrial consumers. Therefore "the bounds of the relevant market . . . are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for finishes and fabrics." In this narrower relevant product market, du Pont did have sufficient market power to pose its General Motors holdings as a restraint of commerce. Despite possible *reasonable* or functional interchangeability of products used by all of industry, it was the lack of responsive interchangeability among the auto manufacturers, *i.e.*, the inelasticity of consumer demand, which defined these narrower boundaries. As in *Cellophane*, it was consumer behavior which provided the key to the relevant product market. Similarly, in International Boxing Club v. United States, 358 U.S. 242 (1959), the facts of consumer preference again controlled in defining the relevant product market. The Court affirmed the lower court's finding that championship and nonchampionship bouts were distinct markets, basing the ruling on the facts that average revenue from championship bouts was $154,000 compared to $40,000 for nonchampionship fights; television rights for championship bouts netted an average of $100,000 compared to $45,000 for nonchampionship; Nielson ratings for the championship broadcasts were 74.9% contrasted to 57.7% for the other bouts; and that *"spectators pay 'substantially more' for tickets to championship fights than for nontitle fights."* 358 U.S. at 250-51. (Emphasis added.)

The same pattern followed in the case of Brown Shoe Co. v. United States, 370 U.S. 294 (1962). In evaluating the vertical aspects of the merger involved, the Court determined the relevant product market, not according to mere *reasonable* interchangeability, but according to *responsive* interchangeability. Focusing on the various "product's peculiar characteristics and uses . . . distinct customers, distinct prices, sensitivity to price changes . . ., 370 U.S. at 325, the Court found the relevant market to consist of men's, women's, and children's shoes. "These product lines are recognized by the public . . . each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers." 370 U.S. at 326. The same analysis was used in defining the relevant product market in the horizontal aspects of the merger. 370 U.S. at 336.

The District of Columbia Circuit reached a decision determined by the same formula in Reynolds Metal Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962). Reynolds argued for a broad relevant market including various foils which were reasonably interchangeable with the product manufactured by its new acquisition. The court found a narrower market consisting of florist foil, however, based on evidence that florist foil brought a lower price, and that other consumers of the comparable higher-price varieties of foil had not responded to the price advantage. 309 F.2d at 228-29.

The same approach is discernible in the recent case of United States v. Aluminum Co. of America, 377 U.S. 271 (1964). In delineating the relevant product market, the Supreme Court separated insulated aluminum cable from insulated copper cable, thereby narrowing the market and ultimately resulting in the finding that Alcoa had effected a merger with Rome Cable Corporation in violation of § 7 of the Clayton Act. The Court based its decision on facts showing that, although the two types of cable were reasonably interchangeable and did even compete to some degree, the insulated aluminum cable was rapidly displacing the copper counterpart for use in overhead distribution lines. Insulated aluminum cable constituted only 6.5% of gross additions to overhead lines in 1950 but had risen to 77.2% by 1959. 377 U.S. at 274. Insulated copper cable, on the other hand, dominated the underground cable field, 377 U.S. at 276, apparently because insulated aluminum cable was physically too inferior for that use. 377 U.S. at 277. There was, then, little responsive interchangeability in

competitive[107] at the same price,[108] and to the merchant as well as the consumer, they are different products.[109] If one accepts the

the underground cable market, though both products were reasonably interchangeable. In the overhead cable market, there was little responsive interchangeability because "the price of most insulated aluminum conductors is indeed only 50% to 65% of the price of their copper counterparts; and the comparative installed costs are also generally less." 377 U.S. at 276. Consumer preference, then, again was the key to the boundaries of the relevant product market.

In Continental Can Co. v. United States, 378 U.S. 441 (1964), the most recent Supreme Court decision defining a relevant market, the Court specifically rested its determination on the facts of consumer behavior. In deciding that metal and glass containers for beer might constitute a single relevant product market, the court noted:

> Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intra-industry mergers, there is over the long run *the kind of customer response to innovation and other competitive stimuli* that brings the competition between these two industries within § 7's competition-preserving proscriptions.

378 U.S. at 455. (Emphasis added.) See 378 U.S. at 453-58. Over a period of time, then, the Court felt that there was a significant responsive interchangeability between metal and glass beer containers.

The problems of delineating the relevant market are plainly analogous to those involved in the issue of "like grade and quality." In both situations the effort should be made to discover what products are in fact so similar that they do compete; in both the search should be for *actual* competition, not merely for the "reasonable" or "functional" interchangeability of competing goods as determined by a laboratory analysis of composition or performance; and in both it is the evidence of consumer behavior in the marketplace which can supply the answer to the question of actual competition. *Cf.* Comment, "Determination of the Relevant Product Market," 26 Ohio St. L.J. 241 (1965).

[107] See text at notes 4-8 *supra.*

[108] Many factors may influence the consumer's decisions. See, *e.g.*, King, "Private Lables Often Harder to Sell than Established National Brands," Advertising Age, July 9, 1962, p. 84: "In spite of the fact that private label instant coffee is an old established item with most retailers . . . it . . . generally sells at a retail price well below the national brand. . . . "

[109] Chamberlain, The Theory of Monopolistic Competition 56 (8th ed. 1962):

> A general class of product is differentiated if any significant basis exists for distinguishing the goods . . . of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. Where such differentiation exists, even though it be slight, buyers will be paired with sellers, not by chance and at random . . . but according to their preference.
>
> Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade names; peculiarities of the package or container, if any; or singularity in quality, design, color, or style. . . . Insofar as these and other intangible factors vary from seller to seller, the "product" in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself.

Consider the *Borden* case; surely in the minds of most consumers the Silver Cow milk was as different from the same milk under private label as from the milk distributed by Borden's competitors.

postulate that the Robinson-Patman Act is directed only at unfair competition, it should follow as a corollary that charging a distributor a higher price for a nationally branded item is not unfair in the price discrimination sense, if it can be demonstrated that it will bring a higher price on resale than its private-brand counterpart.[110]

The selling power of the national brand is an accepted fact of business life.[111] The reasons for this are multifarious, and include the consumer's familiarity with a brand name, his convictions of its reliability or quality, and his psychological response to a brand.[112] The business world has responded to this phenomenon through product differentiation, accomplished through labelling variations[113] as well as through advertising and packaging and physical innovations.[114]

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110 See Rowe, *op. cit. supra* note 83, at 72-73.

111 See, *e.g.*, Peckham, "The Consumer Speaks," J. Marketing, October 1963, p. 21. This article analyzes the results of a Nielson survey of supermarket shoppers. The consumer's predilection not only for brands, but for a particular brand, is illustrated by a graph, *id.* at 23, showing the percentage of consumers refusing to buy substitute products when the brand desired was unavailable. The shoppers were questioned on fourteen product classifications, and the percentage of those who would rather fight than switch ranged from 67% for dentifrice to 29% for tissue. Other figures showed the consumer adhering to his brand despite unavailability of desired size, *id.* at 23, or color, *id.* at 24. Legal significance: the survey may be too narrow in scope to be a ground of decision, but it reveals that to the consumer one brand is not matched in grade or quality by any other in the market. *Cf.* Masen, "A *Few* Consumers Speak," J. Marketing, April 1964, p. 68. See also Cassady & Grether, "Like Grade and Quality," 30 So. Cal. L. Rev. 241, 256-63 (1957); Peckham, "Speaking of Consumers," J. Marketing, April 1964, p. 70. The FTC has long been aware of the selling power of a national brand: "The wider margin per unit in the private-brand items does not necessarily mean a higher total dollar net profit than on competing standard brands because of differences in the turnover of the two." Federal Trade Commission, "Final Report on the Chain-Store Investigation," S. Doc. No. 4, 74th Cong., 1st Sess. 43 (1935).

112 Herzog, "Behavioral Science Concepts for Analyzing the Consumer," in Proceedings, Conference of Marketing Teachers 32, 37-41 (1958). See generally Chamberlain. The Theory of Monopolistic Competition 56-71, 130, 133 (8th ed. 1962).

About half of the housewives interviewed in a pilot study comparing national and private brands conducted for Good Housekeeping believed private labels sell for less because they are "not as good in quality." The percentage of interviewers so convinced varied erratically according to the product categories, which ranged from appliances to canned foods. "Mom Feels Quality, Not Ad Cost, Makes Brand Item Costlier," Advertising Age, Dec. 7, 1964, p. 30.

113 *E.g.*, the Borden Company's practice with its evaporated milk.

114 See Howard, Legal Aspects of Marketing 55-56 (1964); Blumenthal, "How Brand Names Defend and Advance," in Shultz & Mazze, Marketing in Action 241 (1963).

Consider that the market for a given item is segmented;[115] for example, there is a limit to the number of consumers who can or will afford the premium-priced, Borden-labeled Silver Cow milk. The market for less expensive private-label milk exists apart from the premium market. The non-Borden products in the private label market may well be the equal of Silver Cow in chemical properties and quality, yet will sell at a lower price because of lesser consumer demand. The Federal Trade Commission's laboratory approach would shackle Borden with one price for all the milk it produces of chemical identity. This would preclude Borden from entering the competition of the various market segments, forcing it to compete in only one of the several markets and effectively stifling competition by preventing a competitor from entering a distinct market. This, of course, is an incongruous effect for an antitrust law.[116] Conversely, recognition of the commercial difference between Silver Cow and the same milk under a non-premium label promotes overall competition. If the two are recognized as being of unlike grade or quality,[117] Borden may then engage in product differentiation.[118] The Silver Cow brand remains competitive in the premium brand market and the off-brand becomes a new entry in the private brand sector.

The "Emasculation" Argument

The argument is made that the legislative history of the Robinson-Patman Amendment clearly reveals that brand distinctions were to be disregarded in deciding the issues of grade and qual-

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115 See Beckman, Maynard & Davidson, Principles of Marketing 611 (6th ed. 1957).

116 Rowe, "Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act," 66 Yale L.J. 1, 30-35 (1956).

117 The commercial difference should perhaps be treated as creating a difference in grade. Rowe, *op. cit. supra* note 83, at 76. A difference in grade *or* quality of the products exempts the transaction from FTC jurisdiction.

118 Perhaps there is something undesirable in allowing the consumer to be induced to pay more for the premium priced Silver Cow milk when the same milk is on a lower shelf at a lower price. Perhaps this doubt underlies the Federal Trade Commission's doctrine. It seems indisputable, however, that this is not the sort of problem with which the Robinson-Patman Act is geared to cope. Its target is the protection of competition in the distribution system; its administrators should therefore focus on the realities of the market—the place where competition exists. Certain of the processes which create consumer demand may be deplored but the *fact* of demand for a premium brand should not be ignored.

Further, it is at least doubtful that the spur to the economy wrought by product differentiation is really over-balanced by the questionable immorality of the "seduction of the consumer." See Rowe, "Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act," 66 Yale L.J. 1, 27 (1956).

ity.[119] A proposal was made to amend section 2(a) to make it applicable only to price discrimination between commodities of like grade, quality, and brand.[120] Commenting on the proposal, the draftsman of the act asserted:

> The proposal, although it may seem harmless at first sight, is a specious suggestion that would destroy the efficacy of the bill against larger buyers. So amended, the bill would impose no limitations whatever upon price differentials, except as between different purchasers of the same brand . . . and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discrimination that he might demand.[121]

What the speaker envisioned was a manufacturer's creating insignificant label or package variations for every customer, with different prices proportionally responsive to the customer's purchasing power attending each variety. The amendment would indeed have allowed the evil he perceived; commercially insignificant differentiation ought not to sanction price differences. To extrapolate from this the conclusion that commercially significant variations should also be disregarded is unwarranted.[122] Neither the advocates of the commercial standard nor the *Borden* opinion pro-

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[119] *E.g.*, Brief for Respondent, p. 13, Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964); Edwards, The Price Discrimination Law 31 (1959): "[I]t is evident that the wording was carefully chosen to prevent price concessions to large distributors who sold commodities under their own private brands." See Patman, Complete Guide to the Robinson-Patman Act 23, 35 (1963); Seidman, Price Discrimination Cases," in Hoffman & Wingard, Hoffman's Antitrust Law and Techniques 409, 424-28 (1963).

[120] Hearings Before a Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 2d Sess. 421 (1936). Similarly, a proposal to amend the act to read "like grade, quality, and design" was rejected. 80 Cong. Rec. 8234-35 (1936): "[I]f the word design is inserted . . . the door will be open to a situation in which this bill may be flouted and the purposes of the bill destroyed."

[121] Hearings Before a Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 2d Sess. 469 (1936).

[122] Rowe, *op. cit. supra* note 83, at 65:

> The net of the legislative history was this: rejection of proposals to set up "likeness" in brand or design as an additional statutory prerequisite signified that no *blanket* exemption was contemplated for "like" products which differed *only* in brand or design, leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation.

See Brief for Petitioner, pp. 19-21, Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964), Cassady & Grether, "Like Grade and Quality," *supra* note 111, at 272-73.

pose an exemption for the trifling frill; rather, the heart of the argument is that it disfavors economic fact to ignore the significant variations. While a manufacturer might place numerous labels on the same item, it is unlikely that any but his house brand will evince a distinct consumer response. His own brand, *e.g.*, Silver Cow, may command a higher price than his commercially imperceptible "brand *X*", but his "brand *Y*" and "brand *Z*" will generally suffer the same relative anonymity, and he will not be able to evidence consumer response to these off-brands substantial enough to warrant price differences between them.[123] The spectre of emasculation through the use of a plethora of inconsequential brands is fanciful, not real. The adoption of the commercial standard does not bear that as a concomitant.[124] The act continues to be effective against its proper target: unfair or unwarranted price differences to different purchasers of goods of equal commercial value.

The Cases in a New Perspective

Charting the old cases with the new commercial standard as a pole star offers further insight into the emasculation argument. Presumably if the act would be nullified by a market test, the past cases would have had some opposite and undesirable results. Such is not clearly the case, however. Instead, application of considerations implicit in the commercial standard appears to lend some consistency to what hitherto seemed the aimless course of the decisions. Consider the cases previously discussed which dealt with goods having physical variations.[125] It was impossible under the FTC's "laboratory approach" to glean meaningful or useful criteria for determining "like grade and quality" from the language of the opinions. Yet the millinery and handbag cases of 1937 seem clearly to be correct decisions under a commercial standard if the almost certain differences in consumer preferences for the various styles are to be inferred.[126]

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123 See Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962).

124 Borden Co. v. FTC, 339 F.2d 133, 137-38 (5th Cir. 1964); Rowe, *op. cit. supra* note 83, at 65, 75-76; Cassady & Grether, "Like Grade and Quality," *supra* note 111, at 266-67, 272-73; Rowe, "Price Differentials," *supra* note 116, at 15. For confusion concerning the operation of the commercial standard, see Select Comm. on Small Business, "Price Discrimination, The Robinson-Patman Act, and the Attorney General's National Committee to Study the Autitrust Laws," H.R. Rep. No. 2966, 84th Cong., 2d Sess. 98-99 (1956); Dam, "Economics and Law of Price Discrimination," 31 U. Chi. L. Rev. 1, 7-8 (1963).

125 See text at notes 11-44 *supra*.

126 See note 11 *supra*.

The language of *Bruce's Juices*,[127] of course, left no doubt that that court applied a commercial test to determine that physically different cans were of like grade and quality.[128] Yet the ensuing Commission decision in *E. Edelmann*[129] was prima facie at odds with *Bruce's Juices*, for instead of examining the commercial significance of the variations of the automotive parts, the opinion spoke in terms of the similar physical characteristics of the products while deciding that they were of like grade and quality.[130] As in the 1937 cases, however, a commercial test would inferably have yielded the same result. There was no evidence, nor any reason to suspect, that the minor physical variations in the auto parts had any effect on consumer demand.

Similarly, the language of the *General Foods* decision [131] leaves one despairing of finding any consistency in the chain of cases. However, if the fiction of "brand identity" [132] is ignored and focus is directed to the testimony indicating that the blend variations of the Maxwell House coffee were insignificant to the customers,[133] the consistency is apparent: a market test again would yield the same result.

The Commission's ruling in *Atalanta*[134] was unsound by any rationale, but the Second Circuit, of course, used the language of a commercial standard in reversing the Commission.[135] Following *Atalanta*, the Commission's decisions in *Universal-Rundle*[136] and *Quaker Oats* [137] indisputably adopted the commercial standard as a formula for evaluating the grade and quality of physically distinct variations of a product.[138] In such cases, the Commission had previously attempted to mold the language of their opinions around a laboratory approach; but the commercial standard, openly employed by the courts in *Bruce's Juices* and *Atalanta*, seems also to be the unmentioned concordancer of the Commission's pre-*Universal-*

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127 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *modified*, 190 F.2d 73 (5th Cir. 1951), *cert. dismissed*, 342 U.S. 875 (1951).

128 See text at note 13 *supra*.

129 51 F.T.C. 978 (1955).

130 See text at notes 18-19 *supra*.

131 52 F.T.C. 798 (1956).

132 See text at notes 58-60 *supra*.

133 General Foods Corp., 52 F.T.C. 798, 816 (1956).

134 Atalanta Trading Corp., 53 F.T.C. 565 (1956), *set aside*, 258 F.2d 365 (2d Cir. 1958).

135 See 258 F.2d 365, 371 & n.5 (2d Cir. 1958).

136 Trade Reg. Rep. ¶ 16948 (FTC June 23, 1964).

137 Trade Reg. Rep. ¶ 17134 (FTC Nov. 25, 1964).

138 See text at note 44 *supra*.

Rundle decisions. The emasculation argument, then, draws little strength in this quarter.

Unlike the cases involving physically different products, in those dealing with brand-differentiated products the commercial standard would alter some of the results, which after all have heretofore been uniform. Yet where some of the past decisions seem unpalatable, the reason for that appears more clearly in the light of a market test.

It is arguable that application of the market test in the *Goodyear Tire & Rubber* case[139] would yield no different result. Given the low price, the Allstate tire was an unusually strong competitor for an off-brand tire.[140] The opinion reveals that Sears, Roebuck invested in an extensive advertising program promoting the Allstate brand.[141] The permissible inference is that this promotion was successful in creating a consumer demand for the Allstate tire not substantially different from that enjoyed by the Goodyear brand. Further augering against Goodyear's argument under a commercial standard is the fact that Sears advertised the source of its tires as "the leading tire manufacturer," or "the world's foremost tire manufacturer." [142] This sort of information ought to neutralize to a noticable extent consumer predilection for a premium-branded, premium-priced tire. If the rationale of the market test is that the realities of consumer preferences must be recognized, it follows that factors affecting that preference cannot be overlooked. At least a part of a consumer's brand preference stems from his conviction about the quality or reliability of the familiar product or its maker, as opposed to the anonymity of the off brand. If Sears undertakes to inform its customers that the Allstate brand is "off" in name alone and is actually the product of the "foremost tire manufacturer," resistance to the Allstate tire should be mimized, along with Goodyear's contention that the Allstate tire is not of a commercial grade or quality like that of its own brand.

The facts of the *Hansen Inoculator* case[143] were similar. Although there was no evidence of the degree of consumer preference

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139 Goodyear Tire & Rubber Co., 22 F.T.C. 232 (1936).

140 See "Do Car Accessories Sell by Brand?" Printers' Ink, Feb. 28, 1964, p. 48. Consumers specified brand in impressive percentages for antifreeze (54%), tires (52%), and batteries (31%).

141 Goodyear Tire & Rubber Co., *supra* note 139, at 295:

> Sears, Roebuck & Co. adopted a plan of very extensive consumer advertising of its goods . . . and in its advertising campaign, made its tires a leading feature in advertisements in millions of catalogues, national magazines and the leading daily newspapers throughout the United States, featuring the high quality of its new tire and the low price. . . .

142 22 F.T.C. at 295, *but see* the Goodyear-Sears contracts, *id.* at 254, 260, 267.

143 26 F.T.C. 303 (1936).

for the Hansen label, the packaging practice of the purchaser of the private label inoculant was tantamount to trading on Hansen's name. The private brand purchaser identified the source of its product by advertising it as being "made for us under our own label, by a reliable manufacturer at Urbana, Illinois,"[144] the location of the Hansen firm. Further blurring any real distinction between the Hansen and the private brand, the two labels were found to "resemble each other having green borders and background of leguminous plants and similar language."[145] The identification of the source was so specific and the labels so similar as to obliterate any vestige of separate identities, even to the least astute consumer. There could be no basis for finding the goods so marketed to be of differing grade or quality under a commercial standard, for the anonymity of the source had been breached.

Perhaps the two *U.S. Rubber Co.*[146] cases would have had different results under the market test. There is nothing in the report of either case indicating that the favored purchasers were guilty of the abuses found in *Goodyear* or *Hansen,* and there is the likelihood that the U.S. Rubber Co. brands were premium products enjoying significant consumer demand. If the commercial test would reverse the decisions in these cases, it is hardly accurate to assert that the act is thereby eviscerated; it is more likely that the actual results were unwarranted.

The "brand identity" presumption introduced in *General Foods* and *Atalanta* is enlightening when considered from the market standpoint. The Commission almost certainly conceived this notion in response to the economic reality that the Maxwell House and Unox brand names had selling power. Perhaps the result in *General Foods* is acceptable because it accords with the market facts. But in evaluating *Atalanta* it must be remembered that this was a section 2(d) case,[147] wherein the Commission was concerned with advertising allowances. Assuming demonstrable consumer predisposition for Unox products, the FTC was faced with a dilemma: unless all Unox pork products were of like grade and quality, the Atalanta Trading Co. could legally grant advertising allowances on the physically distinct items sold only to the favored purchasers, while granting no allowances to other Unox customers. The galling significance to the FTC lay in the arguable notion that the advertisement of a single Unox product alerts consumers that the entire

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144 26 F.T.C. at 309.

145 *Id.* at 308.

146 United States Rubber Co., 46 F.T.C. 998 (1950); United States Rubber Co., 28 F.T.C. 1489 (1939).

147 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1958).

Unox line is available at a certain store.[148] The relevance of the presumption created by the FTC is that, when evaluating grade and quality in another setting, the FTC was led to recognition of the significance of the market performance of a brand name, just as it had been in the section 2(b) cases.[149]

In both the brand- and physically-differentiated product situations, the commercial standard appears innocent of the crime of emasculation of the Robinson-Patman Act. Moreover, in the physical comparison cases, that standard looks suspiciously like the silent ratio decidendi.

Grade v. Quality

The criticism thrust upon the FTC has been directed at its exclusive use of the "laboratory approach" in resolving the issue of "like grade and quality." The effort has been made to demonstrate that a commercial standard must also be invoked to evaluate intelligently the commercial similarity of commodities. It would, however, be equally unsatisfactory to use the commercial standard as the exclusive criterion. A crude illustration is the fact that an affluent society enjoys a significant amount of discretionary wealth to invest in luxury items. In a real sense, then, all items not necessary to sustain life are in competition for the consumer's luxury dollar. For example, a family might deliberate between acquiring a second automobile or a boat, both manufactured by the same corporation and offered at the same price. A commercial standard, which evaluates the likeness of articles only with respect to consumer response to price, would place the boat and the car within a requisite degree of "likeness" for Robinson-Patman Act jurisdiction, a patent absurdity. The physical comparison test of the laboratory approach would quickly exclude these two items from these strictures, despite the hypothetical equal appeal to consumers.

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[148] See 34 N.Y.U.L. Rev. 1335, 1338-39 (1959). Despite the possibility that the advertisement of a single Unox product might indeed promote the entire line, this alone does not render the products of that line of like grade and quality. That standard has been imported into § 2(d) (see note 1 *supra*) and if it yields a poor result in this situation perhaps it should be read out; but there is no rationale for perverting consumer acceptance of a brand into the foundation of a presumption of "like grade and quality." The evaluation should be one of facts, not of presumption.

[149] The statutory skeleton of "like grade and quality" has largely been fleshed out by the Federal Trade Commission, with surprisingly little resistance by those affected. See note 70 *supra*. That the doctrine has been developed in a fashion that suits the Commission's purposes is, then, not surprising. However, it does not seem likely that the Commission's uniform rejection of brand differentiation can or should withstand the forces of erosion now in play. The late Mr. Justice Cardozo supplied the words for an appropriate prognosis for the commercial standard:

Hypothesis is now reality. What was once a hint has been turned into a com-

Assignment of the commercial standard to the concept of like grade has been proposed before,[150] and that the statute requires a difference in both the grade and quality of commodities is not disputed.[151] The task of physical comparision could most logically be assigned to the concept of "like quality." This criterion could perform the initial task of narrowing the field of products which might be of like grade and quality to those commodities which are so *physically* similar that such differences as exist are too insubstantial to render them of unlike quality. These goods would be of "like quality" within the meaning of the act. The boat and the car would quickly be seen to differ in quality under this test. To commodities which were found to be of like quality the "like grade" criteria would be applied to evaluate the more subtle competitive nuances. Commodities which were found to be of "like grade" under the commercial standard of that concept would then be of both like grade and quality and subject to the prohibitions of section 2(a).

If the proposed division of labor between "like grade" and "like quality" be accepted, the test for what constitutes commodities of "like quality" is somewhat imprecise, but perhaps the boundaries can be delineated. The outer boundaries of commodities of like quality would clearly be determined by the "functional" or "reasonable" interchangeability test of the relevant product market

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mand. By fitting itself to the instance in multitudinous variations, the formula has now authority when at first it had mere persuasion.

And further:

> Now, the impulse or the energy that thus pushes a formula to mastery is the driving force of order, of certainty, of rational coherence, as juristic aim. [Consider the charges that the rigid Commission rule shackles competition and is inconsistent with the antitrust philosophy which spawned the Robinson-Patman Act.] The force has capacity to drive because discretion, unmeasured and unregulated, is felt to open the door to tyranny and corruption. [Consider the evidence that the FTC has largely been allowed to develop this doctrine without contest.] So it is that long before a principle or a rule or a concept has become so firmly established that its title to govern is unchallenged by pretenders, long before this, it will still have made its way, slowly and hesitantly, into terrains of the law that are doubtful or disputed, will still have peopled the legal scene with forms in its own mold. [Consider the "meeting competition" cases of § 2(b)]. It must still compete with other analogies, which may be able to show themselves to be more exact, more expedient, more just.
>
> If they fail in that showing, it will have the right of way.

Cardozo, "Jurisprudence," in Hall, Selected Writings of Benjamin Nathan Cardozo 23 (1947). See Cardozo, "The Nature of the Judicial Process," in Hall, *supra* at 182-83.

150 Rowe, Price Discrimination Under the Robinson-Patman Act 76 (1962).

151 Att'y Gen. Nat'l Comm. Antitrust Rep. 156 (1955).

introduced in the *Cellophane* case.[152] If a seller offered a variety of products bearing substantial or total physical distinctions, yet each was functionally interchangeable with the others, they would be goods of like quality. The selection among these of those which were also of like grade, and therefore within the jurisdiction of the act, would be the function of the commercial standard. A pertinent example would be the glass and metal beer containers found to be in the relevant product market in *Continental Can Co. v. United States*.[153] The two-step resolution proffered here is precisely the method previously submitted as the technique used by the Supreme Court in determining the relevant product market in the Sherman and section 7 Clayton Act cases.

The relevant product market approach, however, is too broad for Robinson-Patman Act purposes. The problems of the Sherman and section 7 Clayton Act cases are vastly different. Those situations require evaluation of the market position of one competitor vis-a-vis the "rest of the field"; the functional interchangeability test is well designed to discern what constitutes the perimeter of "the rest of the field." In the Robinson-Patman Act cases, by comparison, the only products involved are those of one manufacturer.[154] The market position of that seller is not relevant to the determination of whether his products are like grade and quality, nor is the fact of functional interchangeability conclusive of "like quality."[155] None of the Commission cases holding goods to be of like grade and quality involved commodities which had nothing more in common than functional interchangeability. Instead they dealt with products which were substantially similar in composition, differing perhaps in shape or in having an extra ingredient. And properly so: the phrase "like quality" on its face would seem to refer to commodities sharing similar physical properties in composition as well as performance.

Thus, where the relevant market approach to "like quality" would draw Continental Can's glass and metal beer containers within its sweep, and despite the fact that the commercial test would find them to be of like grade, inclusion of such physically distinct items within Robinson-Patman Act jurisdiction would be unprecedented and unwarranted. To do so would be to shackle a manufacturer marketing Continental's product mix with only such price differences for his glass containers as could be cost justified, merely because he produced metal containers also. The more

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[152] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

[153] 378 U.S. 441 (1964). See note 106 *supra*.

[154] See E. B. Muller & Co. v. FTC, 142 F.2d 511, 518 (6th Cir. 1944).

[155] See Atalanta Trading Corp. v. FTC, 258 F.2d 365, 371 (2d Cir. 1958).

restricted and proper boundaries of the "like quality" test, then, encompass commodities of substantial similarity, goods having such appreciable identity that "laboratory techniques" cannot yield further commercially meaningful distinctions. It is at this point that the commercial standard of "like grade" could be fruitfully invoked for final resolution of the issue of jurisdiction.

Conclusion

The argument for the commercial standard has an internal consistency. It properly turns the focus of the "like grade and quality" issue to the market. If the Robinson-Patman Act is to function as an antitrust law, this is an essential development: antitrust laws, after all, regulate competition, and competition is measurable only in the market place. The Federal Trade Commission's "laboratory approach" to the issue ignores this facet of the problem; economic fact is relevant and must be evaluated, not the results of quantitative or qualitative chemical analysis alone.[156] The adoption of the commercial standard, then, hauls the Robinson-Patman Act into line with antitrust philosophy and with the approach proffered as the method used to solve analogous problems under the Sherman Act and section 7 of the Clayton Act.[157] The commercial standard resolves the problem of the anticompetitive results engendered by past Federal Trade Commission policy, and heeds the admonition of the Supreme Court that the Commission's policies should not be allowed to

> extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.[158]

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[156] See Edwards, "The Economic Horizon," in 24 A.B.A. Section of Antitrust L. Proceedings 67, 72-74 (1964).

[157] See note 106 *supra.*

[158] Automatic Canteen Co. v. FTC, 346 U.S. 61, 63 (1953).